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Client Alert

International Arbitration Practice Group

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International Litigation Update: United States Supreme Court Limits Extraterritorial Reach of RICO Claims[1]

On June 20, 2016, the U.S. Supreme Court issued its decision in *RJR Nabisco, Inc. v. European Community*,[2] holding that provisions of the Racketeer Influenced and Corrupt Organizations Act (RICO)[3] apply to conduct that occurs outside the United States only if the conduct violates an underlying predicate statute that itself applies extraterritorially. The Court also held that RICO's private cause of action[4] does not overcome the presumption against extraterritoriality. A private plaintiff must demonstrate "a domestic injury to its business or property" and the statute "does not allow recovery for foreign injuries." As a result, private plaintiffs whose injuries occur outside the United States may not sue under RICO.

The Supreme Court's decision is significant because it continues a line of recent decisions in which the Court has sought to restrict plaintiffs' ability to apply U.S. law to, and to bring claims in the U.S. courts based on, extraterritorial conduct. In *Morrison v. National Australian Bank*[5], the Court established a presumption that U.S. statutes do not apply extraterritorially absent clear indication in the text of the statute that Congress intended that they do. Similarly, in *Kiobel v. Royal Dutch Petroleum*,[6] the Court held that the Alien Tort Statute did not confer U.S. court jurisdiction over tort claims involving conduct abroad.

Conversely, the Supreme Court's decision is the first since *Morrison* that recognizes a limited extraterritorial reach for a U.S. conduct-regulating statute. The Court's ruling preserves the federal government's option to bring RICO lawsuits for racketeering that involves foreign conduct.

I. Background and Procedural Posture

RICO generally prohibits conduct that involves a "pattern of racketeering activity" and imposes civil liability on any "enterprise" that commits two or more "predicate" offenses within a 10-year period. Predicate offenses are acts indictable under numerous federal criminal statutes, and many apply extraterritorially when prosecuted independently of RICO. RICO Sections 1962(a)-(d) create substantive prohibitions punishable by criminal sanctions and civil actions brought by the Attorney General.

The European Community (the EC) and 26 of its member states filed a civil action in the Eastern District of New York against RJR Nabisco, Inc. and

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various affiliates (collectively, RJR), alleging participation in an international money-laundering scheme coordinated from the United States whereby Colombian and Russian drug traffickers would smuggle and sell narcotics in Europe for euros, then use an elaborate series of transactions to pay for large shipments of RJR cigarettes into Europe. The EC alleged that RJR dealt directly with drug traffickers and money launderers in South America and sold cigarettes to Iraq in violation of international sanctions. Additionally, RJR allegedly acquired the Brown & Williamson Tobacco Corporation to expand its illegal activities.

The plaintiffs argued that RJR engaged in a pattern of racketeering activity consisting of numerous acts of money laundering, material support to foreign terrorist organizations, mail fraud, wire fraud, and violations of the Travel Act. They claimed damages through competitive harm to their state-owned cigarette businesses, lost tax revenue from black-market cigarette sales, harm to European financial institutions, currency instability, and increased law enforcement costs.

RJR moved to dismiss the claims on the ground that RICO does not apply to extraterritorial racketeering activity or to foreign enterprises. The district court agreed and dismissed the claims. On appeal, the Second Circuit reversed, holding that Congress had "clearly manifested an intent" that certain predicate acts apply extraterritorially.[7] The court found that "[b]y explicitly incorporating these statutes [whose violation constitutes a RICO predicate act] into RICO as predicate racketeering acts, Congress has clearly communicated its intention that RICO apply to extraterritorial conduct to the extent that extraterritorial violations of those statutes serve as the basis for RICO liability."[8] The Court determined that money laundering and material support of terrorism were intended to apply extraterritorially, while three other predicate acts —wire fraud, mail fraud, and the Travel Act—were not.

II. Extraterritoriality of RICO

In a 4-3 decision authored by Justice Alito, the Supreme Court reversed the Second Circuit's decision and remanded the case for additional proceedings. The Court considered that the issue of RICO's extraterritorial application involves two central questions: first, whether RICO's substantive prohibitions in § 1962 apply to conduct that occurs in foreign countries, and second, whether RICO's private right of action in § 1964(c) extends to injuries suffered abroad.[9]

On the first point of extraterritoriality, the Court noted that a basic canon of statutory construction of the U.S. legal system is the presumption against extraterritoriality. This principle dictates that, absent clearly expressed congressional intent to the contrary, federal laws will be construed to apply only domestically. In *Morrison* and *Kiobel*, the Court developed a two-step framework to analyze extraterritorial claims. The first step the Court considers is whether the presumption against extraterritoriality has been rebutted by clear congressional intent to the contrary. If the statute is not extraterritorial, then the Court looks to the statute's "focus" to determine whether the case involves a domestic application of the statute.[10] Where the conduct relevant to the statute's focus occurred within the United States, the case involves a permissible domestic application even if other conduct occurred extraterritorially. However, where the conduct occurred abroad, the case involves an impermissible extraterritorial application regardless of any other conduct that occurred domestically.[11] If, upon applying the first step, the Court finds that the statute clearly does have an extraterritorial effect, the Court's inquiry will turn on the limits, if any, that Congress has imposed on the statute's extraterritorial application.

Applying this principle, the Court looked to whether RICO's substantive prohibitions in §1962 may apply to foreign conduct. The Court held that RICO rebutted the presumption against extraterritoriality by defining racketeering activity to include a number of predicates that plainly apply to foreign conduct. This incorporation of extraterritorially applicable predicate acts manifested a "clear, affirmative indication that § 1962 applies to foreign racketeering activity."[12] The Court noted, however, that the extraterritorial application of § 1962's substantive

provisions applies "only to the extent that the predicates alleged in a particular case themselves apply extraterritorially," noting that "[t]he inclusion of some extraterritorial predicates does not mean that all RICO predicates extend to foreign conduct."[13] Thus, while some RICO predicates may apply abroad, "many do not."[14] The Court emphasized that RICO's reference to "foreign commerce" means that "a RICO enterprise must engage in, or affect in some significant way, commerce directly involving the United States."[15]

Turning to the facts at hand, the Court found that the EC's allegations under RICO § 1962(b) and § 1962(c) did not involve an impermissible extraterritorial application.[16] The Court assumed that the predicate offenses alleged by the plaintiffs were either committed within the United States or, to the extent extraterritorial, were within the permissible scope of a claim.

III. RICO's Private Cause of Action

The Court then applied the extraterritoriality inquiry to RICO's private right of action and held that the plaintiffs' civil RICO claims had to be dismissed as impermissibly extraterritorial. Section 1964(c) allows "[a]ny person injured in his business or property by reason of a violation of section 1962" to sue for treble damages, costs, and attorney's fees.[17] The Court found that the plain text of § 1964(c) did not clearly indicate congressional intent to create a private right of action for foreign injuries. It concluded that a private RICO plaintiff must allege and prove a domestic injury to its business or property.

The Court explained that "[t]he creation of a private right of action raises issues beyond the mere consideration whether underlying primary conduct should be allowed or not, entailing, for example, a decision to permit enforcement without the check imposed by prosecutorial discretion."[18] It noted that "there is a potential for international controversy that militates against recognizing foreign injury claims without clear direction from Congress."[19] The Court rejected the EC's arguments that the danger of international friction were not applicable when the plaintiffs were not private actors, but rather were states, holding that "[w]e reject the notion that we should forego the presumption against extraterritoriality and instead permit extraterritorial suits based on a case-by-case inquiry that turns on or looks to the consent of the affected sovereign."[20]

Turning to the second part of the analysis, the Court interpreted § 1964(c) as focused on the injury to business or property required for a private suit. Because the EC's complaint proceeded under § 1964(c) and alleged only foreign injuries, the Court held that it must be dismissed.[21]

Justice Ginsburg, joined by Justice Breyer and Justice Kagan, dissented from the Court's conclusion that § 1964 does not provide a civil cause of action for injuries suffered abroad. Justice Breyer filed an opinion concurring in part, dissenting in part, and dissenting from the judgment. Justice Breyer noted that he was particularly unpersuaded by the government's assertion, without examples, that permitting extraterritorial application of Section 1964(c) would create international friction. Justice Sotomayor did not participate in the decision.

IV. Conclusions

The Supreme Court's decision represents a strengthening by the Supreme Court of its jurisprudence limiting the ability of plaintiffs to invoke U.S. law to conduct occurring outside the United States, and viewed more broadly in the context of recent decisions limiting U.S. courts' ability to exercise general personal jurisdiction,[22] the decision can be seen as part of a broader policy choice by the Supreme Court to limit access to U.S. courts for claims involving conduct and/or against parties who have little connection to the United States.[23] First, the decision highlights the fact that the presumption against extraterritoriality is a core principle of statutory interpretation in U.S. jurisprudence. Unless Congress makes it clear that it intends for a statute to apply extraterritorially, courts will

tend to refuse reading into the text an implication of foreign applicability. Second, although the decision recognizes an extraterritorial reach for certain RICO provisions, it is now clear that a plaintiff seeking redress under RICO must demonstrate a domestic injury within the territory of the United States. The decision thus effectively precludes foreign parties from bringing RICO claims when they have no significant ties to the United States, and erects additional obstacles for foreign litigants defending against RICO claims in U.S. courts.

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[2] 579 U.S. __, No. 15-138, slip op. at 2 (June 20, 2016).
[3] 18 U.S.C. § 1962 et seq.
[4] 18 U.S.C. § 1964(c).
[5] 561 U.S. 247 (2010).
[6] 133 S. Ct. 1659 (2013).
[7] *European Community v. RJR Nabisco Inc., et al.*, 764 F.3d 129, 133 (2d Cir. 2014).
[8] *European Community*, at 137.
[9] Slip Op. at 7.
[10] *Id.*, at 9.
[11] *Id.*
[12] *Id.*, at 11-12.
[13] *Id.*, at 11.
[14] *Id.*
[15] *Id.*, at 17.
[16] *Id.*, at 18.
[17] 18 U.S.C. § 1964(c).
[18] Slip Op. at 7 (citing *Sosa v. Alvarez-Machain*, 542 U. S. 692, 727 (2004)).
[19] *Id.*, at 21.
[20] *Id.*, at 22.
[21] *Id.*, at 27.
[22] *See Daimler AG v. Bauman*, 134 S. Ct. 746 (2014).
[23] *See also Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (finding that the Alien Tort Statute does not confer jurisdiction for claims arising outside the United States)